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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 44

AVONDALE MARINE WAYS, INC., PETITIONER

v.

JOSEPH H. HENDERSON, DEPUTY COMMISSIONER, MRS. VIOLA CAMPBELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT DEPUTY COMMISSIONER

OPINIONS BELOW

No opinion was written by the United States District Court for the Eastern District of Louisiana. The opinion of the United States Court of Appeals for the Fifth Circuit (R. 87–89) is reported at 201 F. 2d 437.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1953 (R. 90). The petition for a writ of certiorari was filed April 24, 1953, and granted on June 8, 1953 (R. 92). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether compensation awards could be made by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act to the widow and minor children of one of petitioner's employees, who had been killed by an explosion while engaged in cleaning a tank of a barge located on the ways of a marine railway by means of which the barge had been hauled out of the Mississippi River for repairs.

STATUTES INVOLVED

1. The Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, 44 Stat. 1424, 1426, 33 U. S. C. 901, *et seq.*) provides in pertinent part:

> SECTION 2. *Definitions.*
>
> * * * * *
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).
>
> * * * * *
>
> SECTION 3. *Coverage.*
>
> (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if

recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *

2. The Louisiana Workmen's Compensation Act (Louisiana Revised Statutes of 1950, Title 23) provides in pertinent part:

> SECTION 1031. If an employee not otherwise eliminated from the benefits of this Chapter, receives personal injury by accident arising out of and in the course of his employment, his employer shall pay compensation in the amounts, on the conditions, and to the person or persons hereafter designated. * * *
>
> SECTION 1035. The provisions of this Chapter shall also apply to every person performing services arising out of and incidental to his employment in the course of his employer's trade, business, or occupation in the following hazardous trades, businesses and occupations:
>
> The operation, construction, repairs, removal, maintenance and demolition of railways and railroads, vessels, boats, and other water crafts, terminal docks, * * *.

STATEMENT

Avondale Marine Ways, Inc., petitioner herein, is a Louisiana corporation owning and operating a marine repair yard on the Mississippi River at Avondale, Louisiana (R. 23). It is an authorized self-insurer under the provisions of the Long-

shoremen's and Harbor Workers' Compensation Act (R. 23).

Petitioner does not have at its Avondale ship repair yard a floating or graven dry dock in order to obtain the necessary access to the hull of a vessel for inspection, repairs, or painting (R. 55). Instead, petitioner uses for this purpose a marine railway which extends from the land on shore down into the waters of the Mississippi River (R. 22, 55–57). The cradle of the marine railway is on wheels, which in turn rest upon the tracks of the railway (R. 22). When a vessel is to be pulled from the water for repairs, the cradle of the marine railway is lowered into the water, the vessel is floated onto the cradle and, while the vessel is thus resting on the cradle, the cradle together with the vessel is hauled out of the water (R. 22). Occasionally, when there are other vessels to be repaired, the vessels hauled out of the water by the marine railway are rolled over and rested on cribbing on land to make the cradle available for the hauling of other vessels from the water (R. 48–49).

On July 20, 1951, the *Walter Russ,* a drilling barge, not owned by petitioner, was hauled a distance of about 300–350 feet out of the water by petitioner's marine railway. No part of the barge overhung the water and petitioner's workmen could walk all around the barge on land in order to perform the repair work of cleaning the barge's tanks and painting its hull (R. 52, 53). The barge

was not removed from the cradle since it was expected that the work would be of relatively short duration (R. 49). While these repairs were being made, a flash explosion occurred in one of the barge's tanks, instantly killing Arthur Campbell, an employee of petitioner who, in the course of his employment, was then cleaning out the inside of the tank (R. 21–22).[1]

The deceased's widow and nine minor children filed claims for compensation under the Longshoremen's Act with the Deputy Commissioner for the Seventh Compensation District (R. 20). After formal hearing (R. 17–84C), the Deputy Commissioner made awards of funeral expenses and weekly benefits under the Longshoremen's Act in favor of the claimants, allowing as credits the $400 funeral expenses and other monies paid voluntarily by petitioners directly to the claimants in the amounts fixed by the Louisiana Workmen's Compensation Act (R. 7–12).[2]

Petitioner filed a complaint for injunction in the United States District Court for the Eastern

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[1] Another employee of petitioner, Joseph D'Arenbourg, was also killed by this explosion. His widow and minor children have likewise sought compensation under the Longshoremen's Act, and the proceeding involving these claims has paralleled those of the instant case. The parties have stipulated that the decision in the instant case governs the D'Arenbourg claims (R. 90–91).

[2] Unlike the Longshoremen's Act, the Louisiana Workmen's Compensation Act does not require the employer to pay funeral expenses. See Louisiana Revised Statutes of 1950, Title 23, Section 1231, *et seq.*

District of Louisiana, seeking to set aside and annul the Deputy Commissioner's awards on the ground that the decedent's death "did not occur upon the navigable waters of the United States (including any dry dock), but occurred in the course of employment on land and is within the * * * Louisiana Workmen's Compensation Act" (R. 2–6, 5). The Deputy Commissioner moved for summary judgment (R. 13–16). The District Court granted the motion and entered a judgment in favor of respondents, citing *Continental Casualty Company* v. *Lawson*, 64 F. 2d 802, and *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, in which the Court of Appeals for the Fifth Circuit previously had ruled that a workman's claim for injuries suffered while repairing a vessel located on a marine railway was covered by the Longshoremen's Act (R. 85–86). On appeal, the court below affirmed, stating that it was "of the clear opinion that [its prior decisions] were when decided well decided; that no case since decided furnishes any sound basis for a different view; and that many cases which have been decided since have given the questioned decisions full support and approval" (R. 88). Judge Rives dissented (R. 88–89).

SUMMARY OF ARGUMENT

Since the Longshoremen's Act concededly extends to injuries suffered by workmen while repairing ships in floating or graven dry docks, the

question in this case reduces itself to whether marine railways which, like graven dry docks, are physically attached to land and are commonly used for the same purpose of removing ships from water to repair their otherwise inaccessible hulls are to be differentiated. The holding below that the Act embraces such injuries is supported by two decisions previously rendered by the court below and a recent decision by the Ninth Circuit, although contrary to the rulings in three cases, including an early decision by the Third Circuit. While the Department of Justice, in contrast to the administering agency which has consistently read the Act as covering such injuries, took the contrary position for a short while some twenty years ago, the Department's position has been for some time that the agency's construction is correct.

A. Petitioner's claim that marine railways are not within "any dry dock" as used in Section 3 (a) of the Act (*supra*, p. 2) apparently adopts the approach and reasoning of *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, the first decision by a Court of Appeals on the issue, but which has not been followed by any federal court. This interpretation clearly misconceives the industry understanding of "dry dock"; the term is commonly understood to include marine railways, a fact which this Court has already recognized. *Northern Pacific S. S. Co.* v. *Hall Bros. Co.*, 249 U. S.

119. The *Vesta Coal* decision also ignored the Act's legislative history, which explicitly reveals a congressional purpose to provide protection to ship repairmen. Marine railways constitute the majority of the ship repair structures in the United States, and this purpose can be given full effect only by holding marine railways to be "dry docks", a result further justified by the lack of any differentiation in the legislative history between marine railways and other kinds of dry docks.

Moreover, the position of the Third Circuit and of petitioner is based on a restrictive reading of the Act, in sharp contrast to the accepted rule that the Act is to be liberally construed to effectuate its purposes. Marine railways are clearly within "any dry dock" when that term is liberally construed to mean a dry place to work, particularly since they not only perform the same functions but have the same relation to maritime rights and obligations as do the other types of dry docks. The Third Circuit's ruling likewise gives no effect to the word "any" modifying "dry dock", by failing to recognize that "any" would have been unnecessary if Congress, knowing of the several types of ship repair structures, had intended to exclude marine railways from the Act.

B. 1. Similarly, there is no merit to petitioner's contention that the state law exception contained in Section 3 (a) (*supra*, p. 2) precludes compen-

sation awards in the instant case. The fact that the decedent was killed while physically on land does not remove the compensation claim from admiralty jurisdiction even though the normal rule may be that only injuries suffered in navigable waters or on the high seas are cognizable in admiralty. For the limits of admiralty jurisdiction are not inflexible and there is no barrier to Congress' enlarging that jurisdiction to include compensation for injuries of this type here involved.

Morover, the delimitation of admiralty jurisdiction has not been based solely on the physical location where the injury occurred; on the contrary, substantial, if not conclusive, weight has been accorded to the relation of the structure involved to land or navigable waters. Thus, although to a layman they would seem to be in navigable waters, structures such as docks, wharves, and bridge abutments have been held to be an extension of land and hence constructively "land" because of their close tie-in with land commerce. And although they are permanently affixed to land, graven dry docks are regarded as constructive "navigable waters" and hence within the admiralty jurisdiction because of their concern with ships and maritime commerce. Since marine railways are concerned with maritime—and not land—activities and are indistinguishable from graven dry docks, both being attached to land and serving the same maritime functions, a marine railway is no more "land" than is a

graven dry dock. Under the doctrine of *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, which this Court uses in construing the coverage provisions of the Longshoremen's Act, injuries on a marine railway would be within the exclusive jurisdiction of admiralty and could not be validly covered by state compensation laws. Cf. *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119.

2. Nor does petitioner's position derive any support from the rationale of *Davis* v. *Department of Labor*, 317 U. S. 249, reversing the rejection under state law of a compensation claim in a case of "marginal employment" which the Court recognized might easily have been held to be on the federal side of the boundary. Far from enlarging the state law exception in Section 3 (a), the *Davis* case fosters the trend toward a restrictive interpretation of that provision. The purpose of the "twilight zone" doctrine formulated in *Davis* requires that the principle there applied to state compensation awards should apply at least equally to awards under the Longshoremen's Act, an intent plainly manifested on the face of the *Davis* opinion (see 317 U. S. at 256–7), even though until now this Court has had occasion to apply it only where state law has been invoked.

Applying the *Davis* doctrine here, there is no occasion to reject the Deputy Commissioner's awards for "apparent error," since not only are there several dominant elements of maritime con-

cern but the awards are in accord with this Court's decisions in closely analogous situations as well as with rulings by Courts of Appeals on this very question.

ARGUMENT

THE DEPUTY COMMISSIONER COULD PROPERLY MAKE AN AWARD UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT FOR INJURIES OCCURRING ON A MARINE RAILWAY

INTRODUCTORY

In this case, the Deputy Commissioner has awarded compensation under the Longshoremen's Act to the widow and nine minor children of a deceased employee of petitioner, who was killed while repairing a vessel located on the ways of petitioner's marine railway.

Marine railways, such as that here involved, constitute one of the three general types of structures commonly used in the United States for taking ships out of water in order to repair their otherwise inaccessible hulls. Another such structure is the floating dry dock in which a vessel is moved through open gates and then, after closing the gates, the water is pumped out, so that the resulting buoyancy causes the vessel to rest on the dry bottom of the dock while the dock itself is floating in the water. The third type of structure is the graven dry dock which is dug into the land and, though adjacent to navigable waters, cannot ever be floated upon it. It has gates at the water edge for the admission of water and of

a vessel; when a vessel is floated into it on water, the gates are closed and the water pumped out, so that the vessel rests upon the bottom of the dock which in turn is physically on land.

It is clear beyond any question that an injury to a workman repairing a vessel located in a floating dry dock is within the Longshoremen's Act since the injury occurs both on "navigable waters" and in a "dry dock" within the specific provisions of Section 3 (a). In addition, petitioner concedes, as it must, that a workman injured while repairing a vessel in a graven dry dock is entitled to receive compensation under the Longshoremen's Act (Pet. Br., pp. 23, 28). See *The Anglo-Patagonian*, 235 Fed. 92 (C. A. 4), certiorari denied *sub nom. Lord* v. *Ledwitch*, 242 U. S. 636; *Butler* v. *Robins Dry Dock and Repair Co.*, 240 N. Y. 23; *O'Hara's Case*, 248 Mass. 31; cf. *The Robert W. Parsons*, 191 U. S. 17, 33–34; *The Steamship Jefferson*, 215 U. S. 130, 142–143. Therefore, the basic question presented is whether a marine railway is so different from floating and, in particular, from graven dry docks that an injury suffered by a workman repairing a vessel on a marine railway is not within the Act's coverage.

Petitioner's position that such injuries are not under the Longshoremen's Act is supported by holdings to that effect in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165 (C. A. 3), writ of certiorari dismissed, 291 U. S. 641, as well as in *Colonna's*

Shipyard v. *Lowe*, 22 F. 2d 843 (E. D. Va.) and *Rohlfs* v. *Department of Labor and Industries*, 190 Wash. 566.[3] The holding of the court below that such injuries are covered by the Longshoremen's Act is supported by its own prior decisions in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802 (C. A. 5), and in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732 (C. A. 5), as well as by the recent decision of the Court of Appeals for the Ninth Circuit in *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9). Each of these cases concerned injuries to employees repairing vessels on marine railways, and in the latter cases the Courts of Appeals upheld the Deputy Commissioner's award.[4]

While the Department of Justice—in contradistinction to the Employees Compensation Commission (now the Bureau of Employees Compensation), which is the agency charged with the administration of the Longshoremen's Act—once expressed the view that such injuries were not within the Longshoremen's Act, this was 20 years ago when *Norton* v. *Vesta Coal Co., supra*, was

[3] Petitioner also refers to *Giske* v. *Austrem and Sandstrom*, 1931 AMC 1200 (Pet. Br. pp. 9, 25). But that was a decision by a Superior Court, not, as petitioner states, by the Supreme Court of Washington (Pet. p. 23; Pet. Br. p. 9; but see Pet. p. 12).

[4] Of the 20 federal judges who have considered this question, 14 were of the opinion that the Longshoremen's Act extended to injuries suffered on a marine railway.

pending before this Court on a writ of certiorari.[5] Since that time, the Department has reconsidered the question, and now believes that its earlier position was unsound and that, as the Bureau of Employees Compensation has always viewed the issue,[6] the *Continental Casualty*, *Maryland Casualty*, and *Western Boat Bldg.* cases, rather than the contrary decisions, properly construe the Longshoremen's Act to encompass injuries suffered by a workman repairing a vessel dry-docked on a marine railway.

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[5] After the writ was granted, the Department took the position that the fact that the injury occurred on what was physically land precluded coverage under the Longshoremen's Act (Brief for Petitioner in No. 178, Oct. Term, 1933). But see *infra*, pp. 27–41. Since the Department adopted the Third Circuit's conclusion, if not its reasoning, this Court dismissed the writ of certiorari with the comment that "no substantial controversy is presented at the bar of this Court." 291 U. S. 641.

[6] The Employees Compensation Commission, from the outset, has consistently construed the Act as applying to employees injured while engaged in repairing ships on a marine railway. As noted in the Government's brief in this Court in *Vesta Coal*, the Commission "which by Section 39 of the Act is charged with its administration and authorized 'to make such rules and regulations * * * as may be necessary in the administration of this Act,' has provided by a regulation which has been in effect since the passage of the Act in 1927 that a marine railway is a dry dock. 1927 AMC 1550, 1552." (Brief for Petitioner in No. 178, Oct. Term, 1933, p. 5.) See also the *Colonna's Shipyards*, *Vesta Coal*, *Continental Casualty*, *Maryland Casualty*, and *Western Boat Bldg.*, cases, cited in the text, *supra*, pp. 12–13, in all of which the Deputy Commissioner took the same view. In the federal cases arising since the *Vesta Coal* case in 1934, the Department of Justice has supported the Deputy Commissioner.

In our view, marine railways are included in the phrase "any dry dock" contained in Section 3 (a) of the Longshoremen's Act. *Infra*, pp. 15–26. The fact that the marine railway was technically attached to land does not, in view of the strong countervailing maritime elements connected with marine railways, exclude suits for injuries occurring thereon from admiralty jurisdiction and therefore from coverage under the Longshoremen's Act. *Infra*, pp. 27–41. And even if the nonmaritime aspects might be deemed dominant, the opposing maritime elements and the conflict among the lower courts as to the applicability of the Longshoremen's Act bring the case within the "twilight zone" doctrine of *Davis* v. *Department of Labor*, 317 U. S. 249, a decision rendered subsequent to the Government's acceptance, in 1933–34, of the Third Circuit's ruling of noncoverage in the *Vesta Coal Co.* case. *Infra*, pp. 41–58.

A. *Marine railways are included within the phrase "any dry dock" as used in Section 3 (a) of the Longshoremen's Act*

Apparently adopting the approach and reasoning of the Court of Appeals for the Third Circuit in *Norton* v. *Vesta Coal Co.*, 63 F. 2d 165, the first appellate decision on the question,[1] petitioner

[1] The District Court's decision in *Colonna's Shipyard* case, 22 F. 2d 843 (E. D. Va.), was rendered prior to *Vesta Coal*. The *Rohlfs* case, 190 Wash. 566, was decided later. Both,

claims that marine railways are not within the phrase "any dry dock" as it appears in Section 3 (a) of the Longshoremen's Act (*supra*, pp. 2–3) (Pet. Br. pp. 10, 25–26). In reaching its conclusion, the Third Circuit reasoned that since the terms "dry dock" and "marine railway" technically describe different structures, and a contract to rent or build one could not be fulfilled by renting or building the other, the common meaning of "dry dock" excludes marine railways (63 F. 2d at 166). It consequently ruled (*id.*):

> * * * With these terms describing two different structures, it seems clear that, when Congress used the word "dry dock," it meant a dry dock in the common acceptation of the term, and did not intend to include any other thing. We rest on firm ground when we take Congress at its word. We enter into a field of speculation when we impute to Congress an intent to include something it did not say it included. The mention of one of a class is the exclusion of others. * * *

1. Petitioner's and the Third Circuit's conclusion is based on a misconception as to the meaning of "dry dock." Because of the identity of the function performed by floating dry docks, graven dry docks, and marine railways, the generic term

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however, are based on grounds different from that relied on in *Vesta Coal*. As far as we have been able to ascertain, no federal District Court or Court of Appeals has followed *Vesta Coal*.

"dry dock" is used in maritime affairs to refer to all three structures. As pointed out in both *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d 732, 733, and *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411, "In nautical parlance 'dry dock', 'floating dock' and 'marine railway' are interchangeable terms. Necessarily, all are located on navigable waters and used for exactly the same purposes, i. e., to raise a ship out of water to permit examination and repairs to her hull which are impossible while she is afloat. A ship's master speaks of 'dry docking' regardless of which method is used." Indeed, the company involved in the *Maryland Casualty* case called itself a dry dock company, although it operated a marine railway (101 F. 2d at 733).

Likewise, in *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, the parties, a shipbuilding company and a steamship company, as well as this Court, described the marine railway there involved as a dry dock. The Court summarized the ship repair contract in issue as providing that the shipbuilding company "should tow the vessel from where she lay to the shipyard, haul her out as required upon the *marine railway* to a position on dry land adjacent to the machine shop—*the place being known as the 'dry dock', and the hauling out being described as 'docking'*— * * *" (italics supplied) (249 U. S. at 123). Adopting the terminology of the parties, the Court went on to detail the facts, still refer-

ring to the marine railway as a dry dock (249 U. S., at 123–124):

> * * * At the time the contract was made, another vessel (the *Archer*) was upon the *dry dock*, and it was uncertain how soon she could be returned to the water. It was understood that the *Yucatan* should be hauled out as soon as the *Archer* came off, should remain upon the *dry dock* only during such part of the work as required her to be in that position, and at other times should lie in the water alongside the plant. * * *
>
> * * * * *
>
> The vessel was *docked* and repaired in the manner contemplated by the agreement; she was brought to the shipyard on the 27th of May, and lay in the water alongside of the dock there until the 17th of June, during which time upper decks and beams were put in and other work of a character that could be done as well while she was afloat as in the *dry dock*. On June 17 she was hauled out and remained in *dry dock* for about two weeks while her bottom plates were renewed. * * * [Emphasis added.]

And, in holding that a claim for repairs made to the vessel while on a marine railway was within the admiralty jurisdiction,* the Court emphasized

* In so holding the Court resolved the question reserved in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, where the Court, in ruling that a contract to repair a vessel in a graven dry dock was maritime in nature, expressed doubts whether the same was true of a contract to repair a vessel on a marine railway. See *infra*, pp. 36–37.

the functional identity of marine railways and floating dry docks (249 U. S. at 128):

> * * * there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

See, also, *infra*, pp. 39–40.

Plainly, therefore, the common acceptation of "dry dock," at least among those engaged in the trade, is that it includes marine railways. Since undefined language in a statute is normally to be read in the sense common to the field covered by the statute rather than in accordance with unusual or artificial definitions (*O'Hara* v. *Luckenbach S. S. Co.*, 269 U. S. 364, 370–371; *United States* v. *Maher*, 307 U. S. 148, 155; *Order of Railway Conductors* v. *Swan*, 329 U. S. 520, 525), it follows that marine railways are embraced within "dry dock" as used in Section 3 (a) of the Longshoremen's Act. On its face, the term clearly has that meaning.

2. Not only is the construction adopted by the Third Circuit and petitioner based on a misconception as to industry usage of "any dry dock," but it fails to give effect to the intent of Congress, as evidenced in the Act's legislative history. The report of the Senate Judiciary Committee, recommending the passage of S. 3170,

69th Cong., the bill which was finally enacted as the Longshoremen's Act, contains this significant comment (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16):

> The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships * * *.

Although the House Judiciary Committee amended S. 3170 to make it conform substantially to H. R. 12063, 69th Cong., previously reported (H. Rep. No. 1767, 69th Cong., 2nd Sess., p. 20), the Committee did not change the language here pertinent. In its report on H. R. 12063 the Committee stated (H. Rep. 1190, 69th Cong., 1st Sess., p. 1):

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* While the Committee's report goes on to recognize that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship, so as to bring them within the maritime jurisdiction of the United States, this was so "doubtless because in the opinion of Congress, * * * this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the States * * *." *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C. A. 5); see *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 272–273; *Smith & Son* v. *Taylor*, 276 U. S. 179. In contrast, there had been no such rulings in regard to injuries suffered by employees engaged in repairing vessels on a marine railway. On the contrary, this Court had expressly held that the repairing of a vessel on a marine railway is within the admiralty jurisdiction. *Northern Pac. S. S. Co. v. Hall Bros. Co.*, 249 U. S. 119, *supra*, pp. 17–19.

> The principal wage earners provided for are longshoremen—men engaged in loading and discharging the cargo of a vessel in the dock. Next in importance are the ship repairmen—carpenters, painters, boiler makers, etc."[10]

Thus, although the legislative history contains no express statement that marine railways are included within "any dry dock," it manifests a clear purpose that men engaged in repairing ships should be covered, a purpose evidenced in the Act by the specific inclusion of "any dry dock," i. e., places where ships are repaired. Since marine railways not only are in general use for ship repairing, particularly in the interior and Gulf states, but constitute a majority of the dry docks in the United States,[11] this congressional purpose can be given full effect only by reading "any dry dock," as Congress obviously visualized the phrase, to embrace the marine railway type of

[10] Significantly, at no time during the hearings on the bill was there any distinction made between marine railways and the other types of dry docks, although it was repeatedly recognized at the hearings that men engaged in repairing vessels were to be within the coverage of the proposed legislation. See Hearings before House Judiciary Committee on H. R. 9498, 69th Cong., 1st Sess., pp. 34, 44–45, 52, 118–119, 141–142, 146, 177; Hearings before a Subcommittee of the Senate Judiciary Committee on S. 3170, 69th Cong., 1st Sess., pp. 19, 21, 24, 38, 95.

[11] According to the "Record of American and Foreign Shipping" of the American Bureau of Shipping, on January 1, 1932, 268 of the 530 dry docks in the United States were marine railways.

structure for ship repairing. As stated in *Maryland Casualty Co.* v. *Lawson*, 101 F. 2d at 734 (C. A. 5):

> There are few dry docks, technically considered, in the United States. Floating docks or marine railways or both are to be found at every seaport. It must be presumed that Congress intended to protect the great majority of laborers employed on floating docks and marine railways as well as the comparatively few workmen employed on what are to be technically considered dry docks. We entertain no doubt that in extending the law to cover "any dry dock" Congress intended to include marine railways.

See, also, *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411 (C. A. 9); *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, 805 (C. A. 5).[17]

3. Moreover, the technical restrictive approach to the Longshoremen's Act, on which the position of the Third Circuit and petitioner is based, violates the well settled rule as to the construction

[17] The fact that in the Ship Mortgage Act of 1920, 41 Stat. 1005, 46 U. S. C. 971, Congress made express provision for maritime liens for use of a "dry dock or marine railway" does not, contrary to petitioner's suggestion (Pet. Br., pp. 27–28), indicate a congressional intent to exclude marine railways from "any dry dock" as used in the Longshoremen's Act. The two statutes obviously have different purposes and background, and it is clear that the language of each statute is to be construed in light of, and to effectuate, the purpose of that statute. Cf. *Lawson* v. *Suwannee S. S. Co.*, 336 U. S. 198; *United States* v. *Champlin Refining Co.*, 341 U. S. 290; *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433.

to be given that Act. Since the Act is remedial, designed to enable injured employees or their families to receive the requisite financial aid needed in time of stress, it has become established that the Act should be liberally construed to effectuate its purpose. *Baltimore & P. Steamboat Co.* v. *Norton*, 284 U. S. 408, 414; *Harbor Marine Contracting Co.* v. *Lowe*, 152 F. 2d 845 (C. A. 2), certiorari denied, 328 U. S. 837; *Southern S. S. Co.* v. *Norton*, 101 F. 2d 825 (C. A. 3); *Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968, 971 (C. A. 4); *De Bardeleben Coal Corp* v. *Henderson*, 142 F. 2d 481 (C. A. 5). It is because it regarded the Third Circuit's approach as improperly restrictive that the Court of Appeals for the Fifth Circuit, in *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802, expressly disagreed with the ruling in *Vesta Coal* (64 F. 2d at 804):

> * * * In the case the Warren Elsey (the *Vesta Coal* case) the majority opinion, insisting upon a strict construction of the term "dry dock", holds that it would be mere speculation to impute to Congress an intention "to include something it did not say it included." * * * [W]e feel obliged to agree to the dissenting opinion * * * of Judge Woolley, and to adopt a more liberal interpretation of the phrase, as he correctly quotes it, "any dry dock."[13]

[13] The majority in the *Vesta Coal* case was composed of Judges Buffington and Davis. Judge Woolley dissented.

When the phrase "*any* dry dock" (italics supplied) is liberally construed, there is no reason to distinguish marine railways from floating and graven dry docks. Petitioner's witnesses in this case admitted that a marine railway is used for the same purpose and reasons as floating or graven dry docks, i. e., removing the water from around a vessel to make its hull accessible for repairs (R. 56, 67–68). Moreover, it is clear that, although the structures and methods used for removing the water are technically different, the three structures all have the same relation to maritime rights and obligations. *Northern Pac. S. S. Co.* v. *Hall Bros. Co.*, 249 U. S. 119, 128–129. "In these three types of docks there is no difference in purpose or use, or in their relation to maritime rights and obligations. All are concerned with maritime repairs. Each is an instrumentality in the same art. Their only difference is in the methods in which they function." (*Norton* v. *Vesta Coal, supra*, at 167 (dissent).) In these circumstances, "whatever may have been the definition * * * must be enlarged to include modern facilities for repairing boats out of the water, as the meaning of the term, used in its common, ordinary sense, means a dry place to work in." *Continental Casualty Co.* v. *Lawson*, 2 F. Supp. 459, 460 (S. D. Fla.), reversed on another ground, *Continental Casualty Co.* v. *Lawson*, 64 F.

2d 802 (C. A. 5); cf. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50, 52."

4. Finally, petitioner's position fails to give effect to the word "any" modifying "dry dock" in Section 3 (a). As the dissent in *Vesta Coal* points out (63 F. 2d at 167), the statutory language, which is here to be construed, does not consist solely of the words "dry dock" but rather of the phrase "*any* dry dock." Congress undoubtedly knew that there was more than one kind of dry dock and further that floating dry docks are on navigable waters whereas graven dry docks, as well as marine railways, are physically attached to land. The phrase "any dry dock" was unnecessary as far as floating dry docks were concerned since injuries occurring therein would automatically fall within the statutory language, "an injury occurring upon the navigable waters of the United States", which is the general standard used in the Act (*supra*, p. 2). And if Congress had used the phrase "any dry dock" to cover only graven dry docks, the "any" modifying "dry dock" would have been unusual, since in that situation the language would more appropriately have been "including a graven dry dock" or "including *a* dry dock." The fact that Congress used the more inclusive "any" to modify "dry dock" strongly

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"Since the *Vesta Coal* decision, the Third Circuit has recognized that the Longshoremen's Act is to be liberally construed. *Southern S. S. Co.* v. *Norton*, 101 F. 2d 825.

suggests the congressional understanding that the Act embraces death or injury incurred at any type of dry dock, which, as we have shown (*supra*, pp. 16–19, 22, 24), includes marine railways. In adding "(including any dry dock)", Congress extended the coverage of the Act to one type of death or injury not physically occurring on navigable waters.[15] We show below (*infra*, pp. 27–30) that congress could validly include this area within admiralty jurisdiction, and we have already pointed out (*supra*, pp. 19–22) that it intended to do so when it used the phrase "any dry dock".[16]

B. *The state law exception contained in Section 3 (a) of the Longshoremen's Act does not preclude compensation awards in the instant case*

Petitioner also contends that the Longshoremen's Act does not apply in the instant case for the further reason that the Louisiana Workman's Compensation Act (*supra*, p. 3) could validly

[15] "Including" often means "or" or "as well as", and connotes an addition to, or enlargement of, the preceding description. *Red Hook Cold Storage Co., Inc.* v. *Department of Labor*, 295 N. Y. 1, 8, 64 N. E. 265, 267; *Carr* v. *Railton*, 66 R. I. 225, 243, 18 A. 2d 646, 654; *Arnold* v. *Arnold*, 193 Or. 490, 502, 237 P. 2d 963, 969; *Lowry* v. *City of Mankato*, 231 Minn. 108, 115–6, 42 N. W. 2d 553, 559; *Illinois Cent. R. Co.* v. *Franklin County*, 387 Ill. 301, 314, 56 N. E. 2d 775, 781; cf. *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 189.

[16] The administering agency has construed the Act to cover marine railways since its passage in 1927. See fn. 6, *supra*, p. 14.

provide compensation for the decedent's death and therefore that the case falls squarely within the exclusion from coverage under the Act contained in Section 3 (a) for situations where "recovery for the disability or death through workmen's compensation proceedings may * * * validly be provided by State law * * *." This contention has two facets: First, petitioner urges that since the decedent was on land when the fatal accident occurred, state rather than admiralty jurisdiction attached because only injuries occurring on navigable waters and the high seas are subject to admiralty jurisdiction (Pet. pp. 19–20, Pet. Br. pp. 10, 12, 23–24).[11] Second, petitioner claims that, even if the injury was maritime in nature, it still was a matter of state concern under the line of cases stemming from *Davis* v. *Department of Labor*, 317 U. S. 249, which, as construed by petitioner, have substantially expanded the state law exception contained in Section 3 (a) (Pet. Br. pp. 22–23). These contentions are both without merit.

1. *The fact that the decedent was on land when he was killed does not preclude coverage under the Longshoremen's Act.* - (a) It is true that there is a substantial number of opinions of this Court enunciating the general principle that only in-

[11] This was the basis of the Government's acceptance of the decision in *Vesta Coal* (see Brief for Petitioner in No. 178, Oct. Term, 1933) and of the dissent below (R. 88–89), as well as of the rulings in *Colonna's Shipyards* and *Rohlfs*, *supra*, fn. 7, pp. 15–16.

juries suffered on navigable waters or the high seas are regarded as subject to admiralty jurisdiction. But this delineation of admiralty jurisdiction has never been regarded as inflexible. This Court has long since recognized that "[t]he precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history" (*The Blackheath*, 195 U. S. 361, 365; see also *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52), and further that "the Constitution does not prohibit what convenience and reason demand." *The Blackheath, supra* at 367.

In accordance with this flexibility of admiralty jurisdiction, the Court, in upholding the constitutionality of the Ship Mortgage Act of 1920 (41 Stat. 1000–1006, 46 U. S. C. 911 *et seq.*), which for the first time extended the jurisdiction of admiralty to a suit to foreclose a mortgage on a ship, stated (*Detroit Trust Co. v. The Barlum*, 293 U. S. 21 at 52):

> The authority of the Congress to enact legislation of this nature was not limited by previous decisions as to the extent of the admiralty jurisdiction. We have had abundant reason to realize that our experience and new conditions give rise to new conceptions of maritime concerns. These may require that former criteria of jurisdiction be abandoned, as, for example, they were abandoned in discarding the doctrine that the admiralty jurisdiction was limited to tidewaters. *The Genesee*

Chief, 12 How. 443, overruling *The Thomas Jefferson*, 10 Wheat. 428.

On a similar basis, the Court of Appeals for the Ninth Circuit in *United States* v. *Matson Navigation Co.*, 201 F. 2d 610, has recently sustained as constitutional the so-called Admiralty Extension Act of June 19, 1948 (62 Stat. 496, 46 U. S. C. 740), extending admiralty jurisdiction to "all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land," even though damages done or consummated on land have in the past been regarded as beyond admiralty jurisdiction (see cases cited *infra*, pp. 31–33).

Most significantly, this Court's opinion in *Washington* v. *Dawson & Co.*, 264 U. S. 219, holding unconstitutional the second effort by Congress (Act of June 10, 1922, 42 Stat. 634) to permit the application of state compensation laws to injuries suffered within the admiralty jurisdiction, in effect suggested to Congress (264 U. S. at 227–228):

> Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admi-

> ralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.

The Longshoremen's Act was enacted pursuant to this suggestion by the Court. See H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2; S. Rep. No. 973, 69th Cong., 1st Sess., p. 16.

In these circumstances, the general definition of admiralty jurisdiction presents no obstacle to reading the Longshoremen's Act as applying to the injuries here involved, even though such a construction be deemed an infringement upon that pre-existing general definition, particularly since, as we show (*supra*, pp. 16–22, 24; *infra*, pp. 35–41), "reason and convenience" demand such a result. Cf. *Continental Casualty Co.* v. *Lawson*, 64 F. 2d at pp. 804–805; see *O'Donnell* v. *Great Lakes Dredge and Dock Co.*, 318 U. S. 36. And since marine railways have now been included within the jurisdiction of admiralty, which is exclusive as to matters covered by it, recovery for injuries to a workman engaged in maritime employment thereon, such as the decedent here, "may not validly be provided by State law." See, e. g., *Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Washington* v. *Dawson & Company*, 264 U. S. 219; *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449.

(b) Apart from whether the Longshoremen's Act enlarges admiralty jurisdiction, an examina-

tion of this Court's decisions reveals, we believe, that the Court in resolving the jurisdictional question has not been governed solely by where the injury has occurred but has frequently considered the relation of the structure involved to land or to navigable waters as an important, if not the governing, criterion.

Thus, there can be no question that in fact a dock or wharf is physically located in or over water, and so, to a layman at least, it would seem that the application of the physical test of jurisdiction would require that damage to the dock and, similarly, an injury to a workman on the dock, be held to be maritime in nature. Yet, at least until the Admiralty Extension Act (*supra*, p. 29), this Court had held such torts to be of a nonmaritime nature, on the ground that docks are "structures connected with the shore and immediately concerned commerce upon land. None of these structures were aids to navigation in the maritime sense, but extensions of the shore and aids to commerce on land as such." *Cleveland Terminal and Valley Railroad* v. *Cleveland Steamship Company*, 208 U. S. 316, 321; *The Plymouth*, 3 Wall. 20; *Industrial Commission* v. *Nordenholt Co.*, 259 U. S. 263, 275–276; cf. *Ex parte Phoenix Ins. Co.*, 118 U. S. 610; *Johnson* v. *Chicago and Pacific Elevator Co.*, 119 U. S. 388. In taking into account the purpose of the damaged structure, the result reached in these cases

where the compensation claim was filed under state law, but rather because of the fortuitous circumstance that the only cases coming before the Court in which *Davis* could be applied happened to involve such situations.[22] That the Court intended the doctrine to apply at least equally to awards under the Longshoremen's Act is manifest on the face of the opinion (317 U. S. at 256–257):

> Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There, we are aided by the provision of the federal act, 33 U. S. C. § 920, which provides that, in proceedings under that act, jurisdiction is to be "presumed, in the absence of substantial evidence to the contrary." Fact findings of the agency, where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error. * * *.

[22] *Swanson* v. *Marra Bros.*, 328 U. S. 1 (Pet. Br., pp. 18–20) has no relevance here, since as petitioner admits (Pet. Br. p. 18), it deals with a different question. Moreover, the quoted excerpts from this Court's opinion were general in nature and patently not directed at the borderline situation here involved.

The lower federal courts have uniformly construed *Davis* as applying at least equally to awards under the Longshoremen's Act.[24] *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951–2 (C. A. 4); *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9); *Gahagan Const. Corp.* v. *Armao*, 165 F. 2d 301, 304 (C. A. 1); cf. *Travelers Ins. Co.* v. *Branham*, 136 F. 2d 873 (C. A. 4).[25] As formulated in *Gahagan Const. Corp.* v. *Armao*, *supra* at 304:

> The Supreme Court has indicated that within a shadowy area where it is unclear which law should apply, if either the Longshoremen's Act or a state act is applied, the result will be upheld.

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[24] *New Amsterdam Casualty Co.* v. *McManigal*, 87 F. 2d 332 (C. A. 2), relied on by petitioner (Pet. Br., p. 23), was decided several years before *Davis*. *Royal Indemnity Co.* v. *Puerto Rico Cement Co.*, 142 F. 2d 237 (C. A. 1), certiorari denied, 323 U. S. 756 (Pet. Br., pp. 22–23), involved a totally different problem. The issue was whether the Longshoremen's Act, as extended by the Defense Bases Act of August 16, 1941 (55 Stat. 622, 42 U. S. C. 1651, *et seq.*), applied to injuries suffered by a workman engaged in purely land activities. The First Circuit's obiter, quoted by petitioner, was not concerned with fringe situations.

[25] It is interesting to compare the liberal approach of Judge Soper who wrote the opinion for the Court of Appeals for the Fourth Circuit in the cases cited in the text with his opinion in *United States Casualty Co.* v. *Taylor*, 64 F. 2d 521, certiorari denied, 290 U. S. 639, relied on by petitioner as in conflict with the decision below (Pet. Br., pp. 11–12).

plainly is not based on the mere physical location of the structure.[18]

The rationale of these cases, i. e., that a dock, being an aid to land commerce, is to be regarded constructively as "land" for the purpose of delineating admiralty jurisdiction, has also been applied to resolve the confused situation presented by *Smith & Son* v. *Taylor*, 276 U. S. 179. There, a longshoreman, engaged in unloading a vessel was standing on a stage, which projected a few feet out over navigable waters, when he was struck by a sling loaded with cargo, thrown in the water, and drowned. Although the stage projected over navigable waters and the longshoreman was drowned in navigable waters, the Court ruled that the stage was an extension of the dock, which in turn was land. Since the impact occurred on the stage, i. e., constructive "land," the Court concluded that the injury was not within admiralty jurisdiction. 276 U. S. at 181–182.[19]

[18] In *The Admiral Peoples*, 295 U. S. 649, where a passenger tripped off the end of a gangplank and fell onto the dock, thereby incurring injuries, this Court, in holding that the injury was within admiralty jurisdiction, enlarged on the doctrine that a dock is constructively land by holding that the gangplank "was a part of the vessel's equipment which was placed in position to enable its passengers to reach the shore. It was no less a part of the vessel because in its extension to the dock it projected over the land. Thus, while the libellant was on the gangplank she had not yet left the vessel * * *." (295 U. S. at 651–652.)

[19] Consistently with this ruling, the Court in *Minnie* v. *Port Huron Terminal Co.*, 295 U. S. 647, held to be within admiralty jurisdiction a suit to recover for injuries suffered by a

Just as in the case of docks and wharves, there is no question that the abutments and piers of bridges are physically located in navigable waters. This Court has held, however, that damage by a ship to the abutments of bridges is also nonmaritime in nature. *Martin* v. *West*, 222 U. S. 191; *The Troy*, 208 U. S. 321; cf. *Richardson* v. *Harmon*, 222 U. S. 96, 100–101. This result, which again is based on the ground that "[a]s the bridge was essentially a land structure, maintained and used as an aid to commerce on land, its locality and character were such that the tort was nonmaritime" (*Martin* v. *West*, *sup a*, at 197; see also *Cleveland Terminal and Valley Railroad* v. *Cleveland S. S. Co.*, *supra*, at 320–321) patently is not rested on the physical location test, but, on the contrary, gives virtually conclusive weight to the fact that the structures are tied in with land—and not maritime—commerce.

This criterion—whether the structure involved was concerned with activities on land or navigable waters—rather than that of physical location alone, has likewise been determinative of admiralty jurisdiction over damages to beacons, which, while located in navigable waters, are physically attached to land. In *The Blackheath*, 195 U. S. 361, which involved such a situation, this Court held the damage to be cognizable

longshoreman who, while working on the deck of a vessel, was struck by a swinging hoist and precipitated upon the wharf where he suffered injuries.

in admiralty, stating in an opinion by Mr. Justice Holmes (195 U. S. at 367):

> * * * It is enough to say that we now are dealing with an injury to a government aid to navigation from ancient times subject to the admiralty, a beacon emerging from the water, injured by the motion of the vessel, by a continuous act beginning and consummated upon navigable water, and giving character to the effects upon a point which is only technically land, through a connection at the bottom of the sea.[20]

And in *The Raithmoor*, 241 U. S. 166, which involved damage to an incompleted beacon under construction and the temporary platform used in connection with this construction, this Court commented in holding that the damage to both was under admiralty jurisdiction (241 U. S. at 176):

> * * * The relation of the structure to the land was of the most technical sort, merely through the attachment to the bottom; it had no connection, either actual or anticipated, with commerce on land. It was simply to serve as an aid to navigation * * *.

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[20] The dissent in *The Blackheath* claimed that the result reached by the Court was to overrule *The Plymouth*, cited, *supra*, p. 31. However, in *Cleveland Terminal R. R.* v. *Steamship Co.*, *supra*, p. 31, the Court held that *The Blackheath* had not overruled the prior decisions and distinguished *The Blackheath* on its facts, pointing out that "[t]he damage was to property located in navigable waters, solely an aid to navigation and maritime in nature, and having no other purpose or function" (208 U. S. at 320).

By thus brushing aside the beacon's relation to land as only technical, the Court again made it clear that the structure's purpose rather than its physical location is, in appropriate circumstances, to be accorded greater weight in determining jurisdiction in admiralty.

Turning to a situation closely analogous to that here involved, i. e., that of a graven dry dock, it will be recalled that a graven dry dock is dug into land and is permanently affixed thereto. *Supra*, pp. 11–12. Moreover, in order to repair a ship in a graven dry dock, it is necessary to float the vessel into the dry dock, and then to pump out the water. While the vessel is being repaired, it typically is completely out of water and is supported by the necessary props. Despite these circumstances, there is no question—and petitioner has conceded (Pet. Br., pp. 23, 28)—that a graven dry dock in which a vessel is repaired is not "land," and consequently injuries suffered in the course of these repairs are cognizable in admiralty. *Gonsalves* v. *Morse Dry Dock & Repair Co.*, 266 U. S. 171; *The Anglo-Patagonian*, 235 Fed. 92 (C. A. 4), certiorari denied *sub nom. Lord* v. *Ledwitch*, 242 U. S. 636; *Butler* v. *Robins Dry Dock & Repair Co.*, 240 N. Y. 23; *O'Hara's Case*, 248 Mass. 31.

The rationale for the conclusion that although a graven dry dock is physically on land admiralty law controls repairs therein to a vessel appears in *The Robert W. Parsons*, 191 U. S. 17. In that

case, this Court, rejecting the claim that since the repairs were performed on land the contract was nonmaritime in nature, stated (191 U. S. at 33–34):

> * * * A dock is an artificial basin in connection with a harbor, used for the reception of vessels in the taking on or discharging of their cargoes, and provided with gates for preventing the rise and fall of the waters occasioned by the tides, and keeping a uniform level within the docks. A dry dock differs from an ordinary dock only in the fact that it is smaller, and provided with machinery for pumping out the water in order that the vessel may be repaired. All injuries suffered by the hulls of vessels below the water line, by collision or standing, must necessarily be repaired in a dry dock, to prevent the inflow of water, but it has never been supposed, and it is believed the proposition is now for the first time made, that such repairs were made on land. Had the vessel been hauled up by ways upon the land and there repaired a different question might have been presented, as to which we express no opinion; but as all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. No authorities are cited to this

proposition and it is believed none such exist.

Although *The Robert W. Parsons* involved a contract, the Court's holding in that case has been held to be fully controlling in cases involving torts. See e. g., *Gonsalves* v. *Morse Dry Dock Co., supra,* at 172; *The Anglo-Patagonian, supra,* at 93–94; *Butler* v. *Robins Dry Dock & Repair Co., supra,* at 26–27; *O'Hara's Case, supra,* at 38; cf. *The Steamship Jefferson,* 215 U. S. 130, 142–143. As stated in *Butler* v. *Robins Dry Dock & Repair Co.* (240 N. Y. at 26–27):

> "* * * The contention * * * is that a graven dock such as the one involved in this case is part of the land and that, therefore, when a vessel rests in such a dock from which all of the water has been drawn it is really on land and that an accident happening to a person then on the vessel and certainly to one standing on the bottom of the dock itself is not a maritime tort. We think the decisions of the Supreme Court hold the other way. We think that for the purposes of disposition of such a question as this and also somewhat as a matter of policy lest admiralty law otherwise might be robbed too much of its jurisdiction, it is settled that a vessel floated into a dock of this kind is still in navigable waters even though the water has been temporarily withdrawn. * * *
>
> We do not fail to note the contention of respondent's counsel that the cases of

> *Parsons* and *Jefferson Steamship* (*supra*) were concerned with the decision of other questions than those arising from a tort. That of course is true. Nevertheless it seems to us that the opinions in those cases discussed from a general standpoint the question whether a ship resting in such a dock as the present one was in navigable waters or on land and that they become authoritative on the present question.

This discussion makes it clear that admiralty jurisdiction attaches to the claim of a workman injured while repairing a vessel on a marine railway. As already shown *supra*, pp. 4, 11–12, a marine railway, although attached to land, is physically connected with navigable waters and since its function is that of repairing of ships it is immediately concerned with maritime commerce. Accordingly, since a marine railway has no relation to activities on land and is a part of land only in the technical sense that it is physically attached thereto, the reasoning supporting the conclusion that docks and bridge abutments are extensions of land, and hence are constructively to be regarded as "land" for the purpose of determining jurisdiction, fully justifies the contrary conclusion here that a marine railway is an extension of navigable waters and therefore constructively "navigable waters" within the jurisdiction of admiralty.

Moreover, a marine railway is indistinguishable for purposes of jurisdiction from a graven dry

dock. Both are physically attached to land, both are connected with navigable waters, and both serve the same function, i. e., the repair of vessels engaged in maritime commerce.[a] Indeed, the ground of this Court's holding in *The Robert W. Parsons* that graven dry docks are to be considered "navigable waters"—that the contrary holding "would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs" (191 U. S. at 34)—would, in the absence of the Court's express reservation in that case (*supra*, p. 36), be fully applicable to marine railways, for marine railways constitute the larger percentage of the structures commonly known as dry docks in the United States. *Supra*, p. 21.

And even the doubt manifested in the reservation in the *Parsons* case was resolved in favor of the identity, for the purpose of determining jurisdiction, of marine railways with graven dry docks in *Northern Pacific Steamship Co.* v. *Hall Bros. Co.*, 249 U. S. 119. In that case, which involved repairs to a vessel on a marine railway, the Court expressly held (249 U. S. at 128):

> * * * In *The Planter* (*Peyroux* v. *Howard*), 7 Pet. 324, 327, 341, the vessel, requiring repairs below the water line as

[a] The distinction suggested by petitioner, that a graven dry dock is not "land" because it is below the high water mark (Pet. Br. 28), is not supported by any of the authoritative cases.

> well as above, was to be and in fact was hauled up out of the water; and it was held that the contract for materials furnished and work performed in repairing her under these circumstances was a maritime contract. We think the same rule must be applied to the case before us; that the doubt intimated in *The Robert W. Parsons*, 191 U. S. 17, 33, 34, must be laid aside; and that there is no difference in character as to repairs made upon the hull of a vessel dependent upon whether they are made while she is afloat, while in dry dock, or while hauled up by ways upon land. The nature of the service is identical in the several cases, and the admiralty jurisdiction extends to all.

In these circumstances, a marine railway is no more "land" than is a graven dry dock, and just as injuries suffered by workmen in a graven dry dock are within admiralty jurisdiction (see cases cited, *supra*, pp. 12, 35), so also are similar injuries suffered while repairing a vessel on a marine railway cognizable in admiralty.[2] Consequently, state law may not validly provide recovery through workmen's compensation proceedings, under the *Jensen* line of decision on

[2] In *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 (C. A. 9), where the stern of the vessel being repaired on the marine railway was partially submerged in navigable waters at high tide, the Ninth Circuit deemed it unnecessary to decide whether federal jurisdiction might be tied to that fortuitous circumstance. Compare *The Raithmoor*, 241 U. S. 166, 176.

the exclusiveness of admiralty jurisdiction (see, e. g., *Southern Pacific Company* v. *Jensen*, 244 U. S. 205; *Washington* v. *Dawson & Company*, 264 U. S. 219; *Robins Dry Dock Co.* v. *Dahl*, 266 U. S. 449), a line expressly accepted by this Court for the purpose of construing the Longshoremen's Act. *Parker* v. *Motor Boat Sales*, 314 U. S. 244, 250; *Davis* v. *Department of Labor*, 317 U. S. 249, 256 (see *infra*, pp. 42–43).

2. *The doctrine of Davis* v. *Department of Labor, 317 U. S. 249, requires affirmance of the Deputy Commissioner's awards.* We have shown *supra*, pp. 27–41, that the instant case is clearly within admiralty jurisdiction and the Longshoremen's Act, and consequently there is no occasion to reach the question as to the applicability of the doctrine of *Davis* v. *Department of Labor*, 317 U. S. 249. However, even assuming that the fact that the marine railway is located on land is to be regarded as sufficient to permit the application of state law, it does not follow that the Deputy Commissioner's awards should be upset, for, at the very least, the instant case is within the "twilight zone" recognized by this Court in *Davis* v. *Department of Labor*, 317 U. S. 249, 256, and there is no "apparent error" (317 U. S. at 257) in the Deputy Commissioner's awards so as to warrant their rejection.

(a) Petitioner urges that reversal of the awards is required by the *Davis* case. According to petitioner, the *Davis* case holds that the Long-

shoremen's Act provides protection only where the injury is clearly within admiralty jurisdiction and, further, that even then the Act may be applied solely in those situations where state law cannot possibly apply. Thus, under petitioner's construction, the effect of the *Davis* case is to emphasize and enlarge the state law exception in Section 3 (a) of the Longshoremen's Act.

But the thrust of the *Davis* ruling was certainly not to enlarge the state law exception, and thereby merely move the area of confusion to a new "undefined and undefinable" (317 U. S. at 255) line of demarcation between state and federal jurisdiction—which would be the result under petitioner's reading. Even prior to *Davis*, this Court in *Parker* v. *Motor Boat Sales*, 314 U. S. 244, ruled that this exception in the Act was not to be enlarged beyond the limits set by the line of cases beginning with *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. In *Davis*, the Court went further and laid down a rule for avoiding the sinuosities of the *Jensen* doctrine, instead of petrifying them as petitioner would do. The purpose of the *Davis* rule is to mitigate the hardships to which injured workmen had been subjected by the concurrent system of state and federal compensation statutes established as a result of the *Jensen* principle. The Court recognized that the confusion resulting from the incorporation of the *Jensen* doctrine into this combined system of state and federal law made it frequently

impossible to determine, prior to the institution of litigation, whether the state or the federal law was applicable, with the result that an "injured individual may not only suffer serious financial loss through the delay and expense of litigation, but discover that his claim has been barred by the statute of limitations in the proper forum while he was erroneously pursuing it elsewhere" (317 U. S. at 254). It was to protect the workman against the pitfalls lurking in the "twilight zone" (at p. 256), thereby fostering "the purpose of the federal act, which seeks to give 'to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation,' and the state Acts such as the one before us, which aims at 'sure and certain relief for workmen'" (p. 254), that the Court announced the *Davis* principle and held that, since the workman had applied for compensation under the Washington statute, he should receive compensation thereunder.

The achievement of the objective stated in the *Davis* case is possible only if the doctrine applies to awards under federal law as well as to state awards, for only in that way is the injured workman accorded full protection against the *Jensen* confusion. Where an award has been made under the federal Act, it is not now to be measured, if in the intermediate zone, by the full measure of the jurisdiction left to the states under the later refinements of the *Jensen* principle (see, e. g.,

Grant Smith-Porter Co. v. *Rohde*, 257 U. S. 469; *Miller's Indemnity Underwriters* v. *Braud*, 270 U. S. 59) or by the standard the court would apply if it were free of *Jensen*. As stated in *De Bardeleben Corp.* v. *Henderson*, 142 F. 2d 481, 483, 484 (C. A. 5):

> * * * Congress intended the compensation act to have a coverage coextensive with the limits of its authority and * * * the provision "if recovery * * * may not validly be provided by State law" was placed in the act not as a relinquishment of any part of the field which Congress could validly occupy but only to save the act from judicial condemnation, by making it clear that it did not intend to legislate beyond its constitutional powers. * * *
>
> * * * In the application of the act, therefore, the broadest ground it permits of should be taken. No ground should be yielded to state jurisdiction in cases falling within the principle of the Jensen case merely because the Supreme Court, before the Federal Compensation Law went into effect, did here a little, there a little, chip and whittle Jensen down in the mass of conflicting and contradictory decisions in which it advanced and applied the "local concern" doctrine to save to employees injured on navigable waters, and otherwise remediless, the remedies state compensation laws afforded them. In short, the Federal Compensation Law now in effect, the judi-

> cial tergiversations which went on before its passage no longer have point. * * *

See, also, *Continental Casualty Co.* v. *Lawson*, 64 F. 2d 802 (C. A. 5); *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949 (C. A. 4); *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4). In short, the *Davis* case is, and has been regarded as, another decision of the Court in the trend toward "a more restrictive interpretation of the exception in the Longshoremen's act and an enlarged view of its [i. e., the Act's] scope." *Travelers Ins. Co.* v. *McManigal*, 139 F. 2d 949, 951 (C. A. 4); see also *Newport News Shipbuilding and Dry Dock Co.* v. *O'Hearne*, 192 F. 2d 968 (C. A. 4); *De Bardeleben Coal Corp.* v. *Henderson*, 142 F. 2d 481, 483–484 (C. A. 5); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409 412–415 (C. A. 9).

Petitioner's claim does not derive any support from the fact that, until now, this Court's application of the *Davis* doctrine has resulted in permitting state law to apply in situations where, prior to *Davis*, state law might very well have been inapplicable. See *Moores's Case*, 323 Mass. 162, 167, affirmed *sub nom. Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874; *Baskin* v. *Industrial Accident Commission*, 89 Cal. App. 2d 632, reversed, 338 U. S. 854; 97 Cal. App. 2d 257, affirmed, 340 U. S. 886. That result has come about, not because the Court has regarded *Davis* as applying solely

And the *Davis* case has been construed as requiring the affirmance of an award under the Longshoremen's Act even where compensation had been awarded under state law by the appropriate state agency (*Newport News Shipbuilding & Dry Dock Co.* v. *O'Hearne, supra,* at 971; *Western Boat Bldg. Co.* v. *O'Leary, supra,* at 411–412), a result not involved here since the payments made by petitioner to the deceased's widow and minor children under Louisiana law were concededly voluntary and not pursuant to an award by an agency of the State (R. 5).*

(b) Once it is recognized that the *Davis* doctrine applies to awards under the Longshoremen's Act which are within the "twilight zone", there clearly is no basis for rejecting the Deputy Commissioner's awards, assuming that the injuries here are not exclusively within federal jurisdiction. The maritime aspects of the instant

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* These payments were credited against the Deputy Commissioner's award (R. 12). *Supra*, p. 5. Acceptance of these payments by the claimants does not estop them from proceeding under the Longshoremen's Act. See *Massachusetts Bonding & Insurance Co.* v. *Lawson*, 149 F. 2d 853 (C. A. 5); *Kibadeaux* v. *Standard Dredging Co.*, 81 F. 2d 670 (C. A. 5), certiorari denied, 299 U. S. 549; *Gahagan Const. Corp.* v. *Armao*, 165 F. 2d 301, 307 (C. A. 1); *Western Boat Bldg. Co.* v. *O'Leary*, 198 F. 2d 409, 411–412 (C. A. 9); cf. *Lawson* v. *Standard Dredging Co.*, 134 F. 2d 771 (C. A. 5); *Hoffman* v. *N. Y., N. H. & H. R. Co.*, 74 F. 2d 227 (C. A. 2), certiorari denied, 294 U. S. 715; *United States Fidelity & Guaranty Co.* v. *Lawson*, 15 F. Supp. 116 (S. D. Ga.); *Great Lakes Dredge & Dock Co.* v. *Brown*, 47 F. 2d 265 (N. D. Ill.).

situation, being virtually 100%, are far more substantial than the non-maritime phases involved in *Davis*, as well as in the cases in which the Court has applied *Davis* (*Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, and *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, 340 U. S. 886), and hence there is no "apparent error" calling for rejection of the awards (see 317 U. S. at 256–7).

In *Davis*, where the structural steel worker who had been working on a barge fell into navigable waters and drowned, the Court reversed the Supreme Court of the State of Washington (which had held the death not covered by its state compensation act), apparently on the ground that the fact that the work being done related to the dismantling of a draw bridge, and consequently contained both maritime and nonmaritime aspects, operated to bring the situation within the intermediate zone. *Bethlehem Steel Co.* v. *Moores*, 335 U. S. 874, affirming *Moores's Case*, 323 Mass. 162, involved injury to a rigger, whose work in connection with repairing a vessel in a floating dry dock tied to a pier was principally on the pier. Although the Supreme Judicial Court of Massachusetts plainly regarded the nonmaritime elements as insubstantial (it expressly stated that the decisions of this Court prior to *Davis* would have required it to dismiss the claim under the state compensation law (323 Mass. at 167)),

it nevertheless held that *Davis* required affirmance of the award of the state compensation agency. This Court agreed. And in *Baskin* v. *Industrial Accident Commission*, 338 U. S. 854, 340 U. S. 886, which involved injury to a helper engaged in carrying planks from one hold to another of a vessel under repair, the California court initially affirmed the Commission's dismissal of the claim on the authority of decisions of this Court rendered prior to *Davis* (89 Cal. App. 2d 632), and only upon remand by this Court in the light of *Davis* and *Bethlehem Steel Co.* v. *Moores* (335 U. S. 854), did the California court direct the compensation commission to entertain the claim (97 Cal. App. 2d 257), a holding which this Court affirmed (340 U. S. 886).

In the instant case, not only is the situation predominantly, if not completely, maritime in nature (see *supra*, pp. 16–25, 35–41), but the Deputy Commissioner's awards are in accord with decisions of this Court in closely analogous situations (*supra*, pp. 35–41), as well as with Courts of Appeals' rulings on this very question (*supra*, p. 13). Plainly, therefore, even if federal jurisdiction is not exclusively applicable, there is no "apparent error" and hence no basis, under the *Davis* doctrine, for rejecting the awards of the Deputy Commissioner.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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